The Indiana Prosecutor

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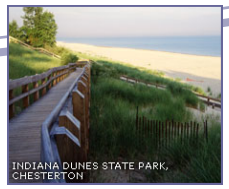
Think Spring!!!



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PROSECUTORS RALLY IN PROTEST OF H.B. 1188

On Wednesday morning, January 26, IPAC Executive Director Steve Johnson became aware that H.B. 1188 had been set for hearing the following morning. That bill, as filed, established a one year moratorium on the operation of "all statutorily created boards, commission, committees, and other similar entities." The Indiana Prosecuting Attorneys Council appeared on the list of more than 300 boards, commissions and committees to be impacted by that moratorium. One of the inequities in the bill was the conspicuous absence of the Public Defenders Council and the Judicial Center from that list. A number of prosecutors were contacted and asked to call representatives from their jurisdictions who sit on the committee scheduled to hear the bill the following morning. The impact of those calls was overwhelming.

On Thursday morning H.B. 1188 was stripped - that's the good news. The bad news is that the language of S.B. 625 was inserted into the stripped bill. S.B. 625 sunsets (terminates) IPAC effective July 1, 2006, unless the governor orders otherwise. Still missing from the modified list of agencies, boards and commissions to be sunsetted was the Public Defenders Council and the Judicial Center. Several members of the legislative committee that heard the bill commented following that hearing they had heard from their prosecutors the previous day. IPAC thanks all of those prosecutors who took time from their busy schedules to contact their representatives concerning this bill. In light of the last minute amendment made to H.B. 1188 no vote was taken on the bill Thursday.

Late Friday afternoon Council Executor Director Stephen J. Johnson was assured by Jason Barclay of the Governor's office that IPAC would be removed from the pending bills.

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RECENT DECISION TOPICS

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Indiana

- **Blood Draw Without Consent O.K.**

Abney v. State, ___ N.E.2d ___ (Ind. Sup. Ct.) *On Transfer* On July 8, 1999, the body of Jon Hefferman was found lying in the middle of a roadway. A car had struck Heffernan and the bicycle he had been riding. Soon thereafter, two Danville police officers saw the defendant, Lanny Abney, driving a car that had extensive front-end damage. The windshield was shattered, the top of the car was caved in, and the airbag had deployed. Abney could only drive his car by leaning his head out of the driver's-side window. When the officers tried to pull Abney over, he sped away, crossed the centerline, and drove on the wrong side of the road. The police had to chase Abney for nearly a mile before he finally pulled into a driveway in a residential neighborhood. The officers noted when Abney got out of his car that he was unsteady on his feet, smelled of an alcoholic beverage, had slurred speech and that his eyes were glassy and bloodshot. Abney admitted to the officers that he had hit something with his car, but said that he did not know what he had hit. The officers observed what they believed to be blood, hair and skin on the front of Abney's car.

Abney was transported to the Hendricks County Hospital after he consented to submit to a chemical test. Once at the hospital, however, Abney changed his mind. A second officer read Abney an implied consent advisement a second time after which the officer told Abney that even if he refused "we are going to have to take the blood due to the fact that we had a serious bodily injury or fatality crash." The officer then completed a form supplied by the hospital. The form stated that the deputy had probable cause to believe that Abney had violated a statutory provision; that he had been transported to the hospital; that Abney had been involved in a motor vehicle accident that resulted in serious bodily injury or death of another; and that the accident that resulted in death occurred no more than three hours before the sample was requested. The hospital staff took a blood sample. An analysis of that sample showed Abney had a blood alcohol content of .21%.

Abney's was convicted, but that first conviction was reversed because of an erroneous jury instruction. Prior to re-trial Abney's attorney filed a motion to suppress the results of the blood test, which motion was denied. The trial court granted interlocutory appeal and the Court of Appeals affirmed the trial court's denial. The Court of Appeals held that I.C. 9-30-6-6(g) allows for the warrantless non-consensual taking of blood in cases involving serious bodily injury or death, regardless of whether a doctor is reluctant to take the sample. The defendant petitioned the Supreme Court for transfer arguing that the Court of Appeals' opinion was in conflict with earlier appellate opinions.

The Indiana Supreme Court held that the state's implied consent statutes "provide the State with a mechanism necessary to obtain evidence of a driver's intoxication in order to keep Indiana highways safe by removing the threat posed by the presence of drunk drivers." The Court went on to say that in its view "limiting I.C. 9-30-6-6(g) to those instances in which a physician refuses to draw blood is inconsistent with the intent of the implied consent statute." The Supreme Court held that contrary language in the four cases cited by Abney in support of his argument was therefore disapproved. The opinion of the Court of Appeals in *Abney's* case was adopted and the trial court's denial of the defendant's motion to suppress was affirmed by the state's high court.

- **Breath Test Results Held Inadmissible**

Napier v. State, ___ N.E.2d ___ (Ind. Ct. App. 1/6/05) Joseph Napier appealed his conviction for Operating a Vehicle With a BAC of .08 Percent or More claiming that his conviction could not stand because the admission of breath test results by certification documents and a BAC DataMaster Evidence Ticket violated the Confrontation Clause of the U.S. Constitution. Napier also claimed that the admission of the breath test ticket in his case violated the Indiana Rules of Evidence in that such the evidence was inadmissible hearsay.

The Court of Appeals, on January 6, held that the admission of the breath test instrument certification documents did not violate the rule set forth by the United State Supreme Court in *Crawford v. Washington.* The Court, however, did find that admitting into evidence the BAC ticket, absent any "live" testimony that would establish a foundation for its admission, was improper. Napier's conviction was therefore reversed.

The Attorney General has advised IPAC that rehearing will be sought in this case. At a minimum *Napier* seems to require that the officer who conducted a defendant's breath test must testify. This testimony is necessary to establishing a proper evidentiary foundation for the breath test, the Court said. Most troublesome, in *Napier,* is the language that states that "the State's failure to present any 'live testimony' at trial from the officer who conducted the tests runs afoul of the Confrontation Clause of the Sixth Amendment to the United States Constitution in light of *Crawford*." It is hoped that the Court of Appeals will grant rehearing for purposes of clarification of this opinion.

IN THE U.S. SUPREME COURT

- *U.S. v. Booker*, ___ S.Ct. ___ (1/12/05) Under the Federal Sentencing Guidelines, the sentence authorized by the jury verdict in Respondent Booker's drug case was 210-to-262 months in prison. At Booker's sentencing hearing, however, the trial judge found additional facts by a preponderance of the evidence. Because these additional findings mandated a sentence between 360 months and life pursuant to the Guidelines, the judge gave Booker a 30-year sentence instead of the 21-year, 10 month sentence he could have imposed based on the facts proved to the jury beyond a reasonable doubt. In a companion case, decided the same day as *Booker*, the maximum sentence authorized by the jury verdict under the Guidelines was a 78-month prison term for Respondent Fanfan. At the sentencing hearing in the Fanfan case, the trial judge found by a preponderance of the evidence additional facts authorizing a sentence in the 188-to-235 month range, which would have required him to impose a 15-to-16 year sentence under the Guidelines instead of the 5-to-6 years authorized by the jury verdict alone. Relying on *Blakely*, the trial judge in *Fanfan* concluded that he could not follow the Guidelines and imposed a sentence based solely upon the guilty verdict in that case.

  On January 11, the United States Supreme Court held, in a 5-4 decision, that the Sixth Amendment as construed in *Blakely v. Washington* applies to the Federal Sentencing Guidelines. Thus, the Supreme Court affirmed the 7th Circuit Court's decision in *Booker*. The 7th Circuit had instructed the district court that had sentenced Booker to 30 years to either sentence him within the sentencing range supported by the jury's findings (210-262 months) or to hold a separate sentencing hearing before a jury. In *Booker,* the Supreme Court went on to say that were the Federal Sentencing Guidelines merely advisory, their use would not implicate the Sixth Amendment. Instead, the Guidelines utilized by federal judges are mandatory, the Court concluded. The Supreme Court affirmed the trial court in the *Fanfan* case.

  Still unclear, even after reading *U.S. v. Booker,* is whether *Blakely v. Washington* impacts Indiana's sentencing scheme. The State argued in oral argument before the Indiana Supreme Court on November 10, 2004, that the presumptive sentence in Indiana is only a guidepost and that Indiana's sentencing scheme is not unconstitutional in light of *Blakely*. The cases argued in November remain under submission. Until those opinions are published, the question of the impact of *Blakely* on Indiana's sentencing scheme remains unanswered.

- *Illinois v. Caballes,* ___ N.E.2d ___ (1/24/05) Defendant Roy Caballes was stopped for speeding by an Illinois State Trooper. When Trooper Gillette radioed dispatch to report his stop of Caballes, a second trooper, a member of the drug interdiction team, heard the transmission and headed to the scene of the traffic stop with his narcotics-detection dog. While Trooper Gillette was writing Caballes a warning ticket, the other trooper walked his dog around Caballes' car. The dog alerted at the trunk. Based on that alert, the officer searched the trunk, found marijuana and arrested Caballes. The entire incident lasted less than ten minutes. Caballes was convicted of a drug offense and sentenced to 12 years in prison.

  On appeal, the Illinois Supreme Court reversed that conviction, concluding that because the dog-sniff was performed absent "specific and articulable facts" to suggest drug activity, the evidence found in Caballes' trunk should have been suppressed. The U.S. Supreme Court granted *certiorari* to answer the question of "whether the Fourth Amendment requires reasonable, articulable suspicion to justify using a drug detection dog to sniff a vehicle during a legitimate traffic stop." The initial traffic stop was lawful, the Court concluded. Further, the duration of the stop was entirely justified by the traffic offense and the ordinary inquiries incident to that stop. The Supreme Court held that a dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no person has any right to possess does not violate the Fourth Amendment. The judgment of the Illinois Supreme Court was vacated and the case remanded.